No. 82-1832

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TOWN OF HALLIE, TOWN OF SEYMOUR,
TOWN OF UNION AND TOWN OF WASHINGTON,
Petitioners,

v.

CITY OF EAU CLAIRE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, AMERICAN PLANNING ASSOCIATION, GOVERNMENT FINANCE OFFICERS ASSOCIATION OF THE UNITED STATES AND CANADA, AIRPORT OPERATORS COUNCIL INTERNATIONAL AND ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES AS AMICI CURIAE IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

Are acts of governance of a local government, based on a state law delegating authority to provide a particular service to the public, subject to the Sherman Act under *Parker* v. *Brown* unless the local government's actions were specifically directed by the state on the basis of an affirmative state policy to displace competition or subject to active state supervision?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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This brief is submitted on behalf of the U.S. Conference of Mayors, the National League of Cities, the National Association of Counties, the American Planning Association, the Government Finance Officers Association of the United States and Canada, the Airport Operators Council International, and the Association of Metropolitan Sewerage Agencies as *amici curiae*. Pursuant to Rule 36.2 of the rules of this Court, *amici* have obtained and filed the written consents of the parties to the filing of this brief. The *amici* support the position of the Respondent and urge that the Court affirm the decision below.

INTEREST OF THE AMICI CURIAE

The U.S. Conference of Mayors ("the Conference") is an Illinois not-for-profit corporation organized in 1933 made up of the Mayors of cities with populations of 30,000 or more. Mayors from more than 480 cities of the 800 cities eligible for membership in the Conference belong to the Conference.

The National League of Cities ("NLC") is an Illinois not-for-profit corporation organized in 1933 to assist municipalities in performing their functions. Its membership includes direct member cities, state municipal leagues and state municipal league member cities. In all, almost 15,000 cities and municipalities, both large and small, are members of and participate in the activities of NLC.

The National Association of Counties ("NACo") is the only national organization representing county government in the United States and includes rural, urban and suburban counties. NACo currently represents 1850 of the nation's 3106 counties and, through them, approximately ninety percent of the population of the United States.

The American Planning Association's ("APA") primary objective is to advance the art and science of planning in the overall development of the Nation and of its communities, cities, regions, and states. APA's 21,000 members include city, county, metropolitan, regional, and state planners, elected and appointed officials at all levels of government, professional practitioners, educators, interested citizens, and students.

The Government Finance Officers Association of the United States and Canada ("GFOA"), formerly the Municipal Finance Officers Association of the United States and Canada, is the professional association of governmental finance managers. GFOA's 9200 members are from city, county, state, provincial, and federal governments, school and other special districts, retirement systems, colleges, universities, public accounting firms, and financial institutions.

The Airport Operators Council International is the nonprofit corporation, established in 1948, that represents the governmental entities, primarily municipalities, counties, airport, and multipurpose transportation authorities, which own or operate the Nation's major airports served by the scheduled airlines.

The Association of Metropolitan Sewerage Agencies was formed in 1970 and is a nonprofit association representing 94 large metropolitan and municipal sewerage agencies. Its member agencies have responsibility for the management of the Nation's largest municipal waste treatment facilities which serve more than 73 million people.

The case before this Court involves the question of whether an act of governance by a local government is reviewable under the Sherman Act. The Court's answer to this question is of enormous consequence to local governments because it will have a direct bearing on their ability to govern and the structure of the governmental system.

The *amici* are participating in this case in order to provide the Court with an understanding of the functions of local government and the consequences which its decision will have for the existing system of governance. The *amici* are particularly interested in putting this purported antitrust case in the context of its potential impact on the existing system of governance.

The *amici* urge that, in the event the Court articulates standards in the context of this case under which the actions of local government could be subject to the antitrust laws, those standards should be clear and understandable, ensuring that local governments are not unnecessarily burdened by costly antitrust litigation with the

potential of bankrupting treble damage awards for inadvertent or unknowable violations of the antitrust laws.

STATEMENT OF THE CASE

The case before this Court stems from a dispute between the City of Eau Claire ("City") and four towns, the Towns of Hallie, Seymour, Union and Washington ("Towns"), all of which are located in the State of Wisconsin, over the provision of sewage service. The Towns allege that the City violated section 2 of the Sherman Act, 15 U.S.C. sec. 2, by refusing to provide the Towns with access to the City's municipally owned and operated sewage treatment facilities on terms that were acceptable to the Towns.

In the ordinary course of events, this intrastate dispute between state instrumentalities would be resolved at the state level through the state courts, the state legislature, the governor of the state or other cognizant state agency. However, the Towns have taken the extraordinary step of seeking mediation of this claim in the federal courts.

In order to obtain resolution of their claim in the federal courts, the Towns have fashioned an unusual and unconvincing interpretation of local government and its functions. The Towns characterize both the City and the Towns as entities which are engaged in commerce or trade (i.e., the sale of sewage service) for purposes of this case. The City's alleged violation of the Sherman Act is described by the Petitioners as using a monopoly over sewage treatment and disposal services in the relevant geographic market to gain a monopoly over the collection and transportation of sewage in that market to the detriment of the business interests of the Towns.

Specifically, the Towns contend that the actions of a local government, apparently including acts of governance by a local government, are subject to the federal antitrust laws unless the state has directed or authorized the anticompetitive conduct of the local government "which

necessarily follows from the State's policy" or, alternatively, the state actively supervises the actions of a local government in cases in which decision making authority has been delegated to the local government by the state. *Id.* at 40.

SUMMARY OF THE ARGUMENT

Prior to 1978, when the Court made its ruling in *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), it would have been regarded as remarkable for any federal court to consider seriously the argument that the operation of a municipal sewage treatment plant by a city could be deemed to constitute the monopolization of trade or commerce among the states and, therefore, subject to review under the Sherman Act. It now appears, however, that *Lafayette* and its progeny, particularly *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982), mandate an examination by the federal courts as to whether the operation of a municipal sewage treatment facility is compatible with the requirements of the federal antitrust laws.

In this case, the District Court and the Court of Appeals reviewed the recent judicial interpretations of the federal antitrust laws and rejected the claims of the Towns on the ground that the conduct in question falls within the state action exemption established by this Court in *Parker* v. *Brown*, 317 U.S. 341 (1943), and subsequent holdings. While this conclusion in itself appears to be a reasonable decision in light of the absence of clear guidance from the Court in this area, *amici* urge that the Court make clear that certain actions by local government are not cognizable under the federal antitrust laws.

The actions of the City in this case were acts of governance and did not involve the commerce or trade that is necessary for the federal antitrust laws to apply to a particular activity. The City was acting in its capacity as an instrumentality of the state, not on the basis of

commercial motivation. If the antitrust laws are to be applied to the acts of governance of local government, the effective operation of state and local government would be impaired and the Federal Government would become unduly and improperly involved in state and local matters.

ARGUMENT

I. ACTS OF GOVERNANCE UNDERTAKEN BY A LOCAL GOVERNMENT ON THE BASIS OF STATE LAW TO MAINTAIN PUBLIC ORDER OR TO PROMOTE THE COMMON WELFARE DO NOT PRESENT QUESTIONS THAT ARE PROPERLY SUBJECT TO ANTITRUST ANALYSIS.

A. Such Acts Of Governance By A Local Government Are Not Commercially Motivated And Therefore Should Not Be Reviewed Under Rules Designed To Encourage Competition In The Private Sector.

In *Lafayette* and *Boulder*, the Court ruled that the "state action" exemption established in *Parker* does not apply to local governments in the same manner as it does to states. However, the Court's determination that local governments are not *per se* immune or exempt from the antitrust laws does not preclude the Court from recognizing that acts of local government which are taken to implement public policy are fundamentally different from commercially motivated actions of private parties. The recognition of the proper role of local government under the federal antitrust laws is clearly within the purview of this case.

The Petitioners' assertion that the conduct of any "nonsovereign" should not be exempt from antitrust challenge unless the strict test for the state action exemption established in *Parker* and its progeny is met [1] should be rejected. There are fundamental differ-

[1] "First, the State must clearly and affirmatively adopt a policy to displace competition. . . . Second, the particular anticompetitive conduct must necessarily follow from the State's *directive* to implement that policy." *Brief for Petitioners*, at 14 (emphasis added).

ences between the actions of local government which are taken to implement public policy and the actions of private sector participants which are taken for private economic gain. While many activities of local government may have an impact on the economic position of private parties, they are not undertaken to further the economic interest of public officials, local government, or the electorate except in ways that are so remote as to be removed from commerce, and, therefore, should not be cognizable under the antitrust laws.[2]

The most troublesome question raised by *Lafayette* and *Boulder*, which the Court has yet to address, is whether local governments must base each of their activities on specific state authorizing legislation, including activities inextricably tied to the public welfare, to avoid scrutiny under the Sherman Act. In the absence of a clear answer to this question, local governments will be forced to go through costly and time consuming antitrust litigation simply to find out whether or not their actions are within the ambit of antitrust analysis. It has long been widely recognized and accepted that acts of governance and the acts of commercial entities are fundamentally different:

[2] *See Lafayette, supra*, "It may be that certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government." 435 U.S. at 418, n. 28. *See generally* Posner, "The Proper Relationship between State Regulation and the Federal Antitrust Laws," 49 N.Y.U.L. Rev. 693 at 705 (1974). *See also Affiliated Capital Corp.* v. *City of Houston*, 735 F.2d 1555 (5th Cir. *en banc* 1984) (Higginbotham, J., concurring), "where . . . [the local government] acts as a regulator or governor of the sales and deliveries of goods and services to its constituents, it is engaged in a role dissimilar from that of private business." 735 F.2d at 1571. "In our economic system, private business enterprises are presumed to respond predominately, if not exclusively, to the profit motive. By contrast the concept of 'profit' per se is alien to the purposes of a unit of government. Consequently, the clash of interests necessitating an antitrust law—the private desire to reap extra-normal profits versus the public interest in free competition—will not appear in its traditional form when the accused conspirator is a governmental entity." 735 F.2d at 1571-1572.

> Local governments are established as political and governmental instrumentalities, not profit-making entities. . . . Early the Supreme Court took the position that the city is a public institution, created for public purposes only and hence has none of the peculiar qualities and characteristics of a trading company instituted for purposes of private gain, except, of course, that of acting in a corporate capacity. . . . [*Nashville* v. *Ray*, 86 U.S. 468, 475 (1873)]. The object of the city or town is governmental, not commercial. It is organized to make expenditures, not profits. Private gain, trading, speculation, or the derivation of pecuniary profit are not purposes or objects within the contemplation of the charter . . .
>
> A city "is vitally a political power;" it is but "an affluence from the sovereignty" of the state, governs for the state, and its authorized legislation and local administration of law are legislation and administration by the state through the agency of the city. 1 McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS, sec. 1.57 at 81-82 (3d ed. 1971) (footnotes omitted).

Generally, local governments have responsibility for a wide range of subjects under state law, including matters of general concern such as public order and welfare; licensing; land development; streets and public ways; and the provision of public services, including sewage service, welfare, education, and transportation. 3 D. SANDS AND M. LIBONATI, LOCAL GOVERNMENT LAW, *passim* (1982). The *amici* urge that acts of governance[3] which local governments must undertake in order to provide these services be recognized by the Court as not within the reach of the Sherman Act.

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[3] "Governance" is defined as "the act, manner, function or power of government." "Govern" is defined as "to exercise authority over; rule, administer, direct, control, manage, etc." and "implies the exercise of authority in controlling the actions of the members of a body politic and directing the affairs of state, and generally connotes as its purpose the maintenance of public order and the common welfare." WEBSTER'S NEW WORLD DICTIONARY at 604-605 (1966).

Acts of governance are, for the most part, simply not the types of activities that can be properly assessed under antitrust analysis. Government, including the Federal Government along with state and local governments is, for example, in the process of developing policies to deal with hazardous waste problems which accommodate both the public's interest in health and safety and the private sector's economic interests. The essence of governance is the pursuit of the public good. Under existing antitrust principles, however, the concept of the public good is not cognizable under the rule of reason analysis. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 687-692 (1978).

Acts of governance cannot be redefined to conform to the policies of the Sherman Act. It is difficult to cite cases in support of this proposition because the application of the antitrust laws to activities of a similarly noncommercial nature of other entities borders on the preposterous. For example, rival churches "compete" for members, but no one would argue that churches should be subject to the Sherman Act because of the existence of competition for membership.

Until *Goldfarb* v. *Virginia State Bar*, 421 U.S. 733 (1975), the activities of professional associations were generally assumed to be noncommercial activities and therefore not subject to the antitrust laws.

> [T]he proscriptions of the Sherman Act were "tailored . . . for the business world," not for the noncommercial aspects of the liberal arts and the learned professions. In these contexts, an incidental restraint of trade absent an intent or purpose to affect the commercial aspects of the profession, is not sufficient to warrant application of the antitrust laws. *Marjorie Webster Jr. College* v. *Middle States Association of Colleges and Secondary Schools*, 432 F.2d 650, 654 (D.C.Cir. 1970) (footnotes omitted).

In *Marjorie Webster Jr. College*, the Court of Appeals found that, while it might be possible to conceive of com-

mercially motivated restrictions flowing from the accrediting of educational institutions, "the process of accreditation is an activity distinct from the sphere of commerce; it goes rather to the heart of the concept of education itself." 432 F.2d at 655.

If acts of governance which are designed to result in improvements in the community's public services were treated as commercial activities, then communities which choose to spend additional funds on public services might find themselves in antitrust imbroglios with neighboring communities that have chosen not to provide similar services. For example, communities surrounding a city may use the antitrust laws to gain access to a superior landfill site located in the city instead of taxing their own residents to construct and maintain landfill sites in their communities. Similarly, businesses may sue the local government because it is providing regulatory or tax incentives, or tax increment financing to competitors in furtherance of an important public goal, such as the redevelopment of a central business district. *Scott* v. *City of Sioux City*, 736 F.2d 1207 (8th Cir. 1984).

Should the antitrust laws be a mechanism for guaranteeing uniformity of public services throughout the Nation, or should local governments be allowed to make taxing and spending decisions without the fear of antitrust challenge? If the antitrust laws apply to acts of governance of local governments, then the harsh economic choice facing local governments caused by potential liability under the antitrust laws will force them to forego innovative solutions to difficult problems. *Hybud Equipment Corp.* v. *City of Akron*, No. 83-3306, slip. op. (6th Cir. August 24, 1984); *Central Iowa Refuse Systems, Inc.* v. *Des Moines Metropolitan Solid Waste Agency*, 715 F.2d 419 (8th Cir. 1983). Similarly, it will discourage local governments from investing scarce public resources to guarantee essential public services. *Scott* v. *City of Sioux City*, 736 F.2d at 1213; *Gold Cross Ambulance and Transfer and Standby Services, Inc.* v. *City of Kansas*

City, 705 F.2d 1005 (8th Cir. 1983). If the Court sanctions cases such as these under the antitrust laws, it will surely hasten the end of the participation of local governments in the state and local partnership as "laboratories" in the federal system trying "novel social and economic experiments without risk to the rest of the country." *New State Ice House Co.* v. *Liebmann*, 285 U.S. 262, 331 (1932) (Brandeis, J., dissenting).

This Court has recognized, "in the application of the Sherman Act . . . it is the nature of the restraint and its effect on interstate commerce and not the amount of commerce which are tests of violation." *Apex Hosiery* v. *Leader*, 310 U.S. 469, 485 (1940). Clearly local governmental actions to protect or advance the common welfare, while they may have the effect of restraining commerce or trade, are not restraints of a commercial nature or motivated by profit.

Antitrust analysis requires an assessment of the private economic or commercial motivations of activities undertaken in interstate commerce. Acts of governance by local governments, because they do not involve private economic or commercial motivations, cannot be fitted into a mold which is completely alien to their purpose.

B. Local Governments, As State Instrumentalities, Cannot Be Treated Like Private Enterprise Under The Sherman Act.

The parties to this lawsuit, the City and the Towns, are all instrumentalities of state government established under state law for the purpose of providing local self-government for their residents. The purpose of local government, while of a different scope, is generally similar to the purpose of other levels of government. Historically, governments were formed primarily for the purpose of performing functions for the common good. *See* Frug, G., "The City as a Legal Concept," 93 Harv.L.Rev. 1059, 1095-1099 (1980). In fact, government has developed as a result of a recognition that certain needs of society can most effectively be met on a collective basis.

The Nation's founders, in creating a strong federal system from a loose confederation of states, made a determination that certain functions were the responsibility of the national government. U.S. CONST. art. I. sec. 8. Similarly, states and local governments have assumed responsibility for certain functions which have gradually been defined (and continue to be further defined) through the political process as government's responsibilities. For example, at one time (i.e., during the Colonial Period, and in the early part of the Nineteenth Century in some cases) fire protection services were provided on a commercial basis by private entrepreneurs. To prevent economic—and sometimes physical—warfare among competing private concerns, local governments established local fire departments. These fire departments supplanted private enterprise as it was determined through the political process that service of an acceptable quality could be guaranteed for all residents of the community only by direct government involvement in the provision of fire protection services.

In countless other areas, governments have assumed responsibility for certain functions, providing services to the public which would otherwise not be provided or would not be available to all members of the public because of inefficiencies or diseconomies.

1. *The Provision Of Sewage Service Does Not Involve Commerce Or Trade; It Is An Act Of Self-government Undertaken By Local Government Acting As An Instrumentality Of The State.*

In this case, the City is the State of Wisconsin's instrumentality for providing local self-government under state law for its residents. The construction, maintenance and operation of a sewer system by a municipality is a typical example of local government actions which are undertaken to enhance the safety, welfare and convenience of the residents of a community. *New Orleans*

Gas Light Co. v. *Drainage Commission*, 197 U.S. 453 (1904).

The mere fact that a city's sewage treatment and disposal facilities may be supported by local taxes and/or user fees does not transform the government into an enterprise engaged in trade or commerce as the Petitioners have argued. A "city has no governmental obligation to provide for persons living outside its territorial boundaries." *Copper Country Mobile Home Park* v. *Globe*, 131 Ariz. 329, 641 P.2d 243 (Ct. App. 1982). The Petitioners' recourse should be through the political process, not the federal antitrust laws: "As we have stated . . . the remedy of the outside consumer . . . is an appeal to the political authority, such as the legislature or the voters of the state, or a refusal to accept the service on the terms offered by the city." *City of Phoenix* v. *Kasun*, 54 Ariz. 470, 97 P.2d 210, 214 (1939). In the absence of a legislative mandate to provide sewage service, the municipality is the sole judge of the necessity of providing sewage service. 11 MCQUILLIN, *Op. cit.*, sec. 31.17 at 187.

The City's actions should be recognized as acts of governance which have none of the characteristics of trade or commerce and, therefore, should not be cognizable under the federal antitrust laws. The City is an instrumentality of the State of Wisconsin and any action legally performed under state law by the City is an act of governance under state law. The Wisconsin Supreme Court has already found that the City's actions were valid acts of governance under state law. *Town of Hallie* v. *Chippewa Falls*, 105 Wis.2d. 533, 314 N.W.2d 321 (1982). According to the court, "This service [the provision of sewage service] resembles other governmental services such as police and fire protection which are monopolies for the public good. *There is no profit motive involved.*" 314 N.W.2d at 326 (emphasis added).

II. THE APPLICATION OF THE ANTITRUST LAWS AS PROPOSED BY THE PETITIONERS TO ACTS OF GOVERNANCE BY LOCAL GOVERNMENT WOULD THREATEN THE EFFECTIVE OPERATION OF STATE AND LOCAL GOVERNMENT AND IMPROPERLY INJECT THE FEDERAL GOVERNMENT INTO STATE AND LOCAL RELATIONS.

A. Under The Interpretations Of *Lafayette* and *Boulder* Proposed By Petitioners, Almost Every Existing State Law Delegating Authority To Local Governments Would Fail To Withstand Scrutiny Under The Antitrust Laws.

The Petitioners argue for an application of the tests established in *Parker* and its progeny to acts of governance by local government that would effectively prohibit local governments from fulfilling the responsibilities delegated to them under state law. Specifically, the Petitioners argue that a state law which "reflects a state policy to leave questions of municipal sale of sewer services in general—and competition in particular—to the local municipalities" (*Brief for Petitioners*, at 33) does not meet the *Parker* test for exemption from the Sherman Act under the state action exemption. The Petitioners contend that "[t]o be exempt, the City must also establish that the State has directed the City to implement . . . policy [to displace competition with regulation] with the particular anticompetitive conduct in question." *Id.* at 24.

There is no question that Wisconsin municipalities have been delegated authority by state law to provide sewage service, including broad discretion to provide service outside corporate limits. WIS. STAT. sec. 66.076(1) (1981). In fact, under that law, a city "may construct, acquire or lease, extend or improve any plant and equipment within or without its corporate limits for the collection, transportation, storage, treatment, *and* disposal of sewage" (emphasis added). Thus, state law clearly contemplates the offering of sewage services as a complete package of services, including transportation and collection components as well as the treatment component, in unincorporated areas.

The Wisconsin statute, like most state laws which delegate responsibility to local governments, was enacted in 1981, prior to the 1982 decision in *Boulder*. The facts of this case underscore the dilemma now facing state and local governments as a result of the Court's expansive interpretation of the *Parker* ruling in *Boulder*.

The powers of local government are derived from common law and state constitutions and statutes. The functions of local government have gradually evolved over the years as concepts of society's responsibilities for the common welfare have changed. Thus, most of the existing body of law—whether common law principles or specific provisions of a state statute or constitution—which delegates particular responsibilities to local governments was established prior to *Lafayette* and *Boulder* and, in some areas, prior to the *Parker* ruling or the enactment of the Sherman Act in 1890.

Consequently, there are virtually no state laws which would meet the test proposed by the Petitioners. Unless a state law was enacted subsecuent to the *Boulder* ruling, the state legislature could not possibly have realized that its delegations would have to meet *Boulder* standards.

There should be a presumption that existing state laws delegating authority to local governments are valid. The Court's ruling in *Lafayette* and its progeny has effectively reversed that presumption. In *Lafayette*, reflecting concern for the rights of antitrust plaintiffs, this Court stated, "It fairly may be questioned whether [the plaintiff-corporation] ha[s] a meaningful chance of influencing the state legislature to outlaw on an *ad hoc* basis whatever anticompetitive practices [defendant-city] may direct against them from time to time." 435 U.S. 389, 406. *Lafayette* and *Boulder* have imposed a similar burden of far greater magnitude on local governments which are now apparently required to obtain explicit authorization

for any action they take that has anticompetitive consequences.

If this Court believes that "the economic choices made by public corporations . . . are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations . . . ," *Lafayette* at 403, then the Court also must recognize that it is no more likely that local governments have any more "meaningful chance of influencing state legislatures" to receive *Parker* protection than private parties have of receiving protection from the acts of local governments. This Court should be prepared to recognize that existing state authorizations which have "reasonable or foreseeable" anticompetitive consequences, when the local entity engages in the authorized activity, are sufficient for protection from antitrust liability under the state action exemption. *Town of Hallie* v. *City of Eau Claire*, 700 F.2d 376, 381 (7th Cir. 1983). *Amici* contend that local governments should not be required to return to the state legislature for a new grant of authority, when they already have authority to act under state law, solely for the purpose of escaping antitrust scrutiny for engaging in acts of governance.

Acceptance of the Petitioners' assertions would mean that the existing body of law under which the powers of local government are defined and established would have to be almost completely rewritten in order to conform to the federal antitrust laws.

1. ***Local Governments Would Be Unable To Perform The Functions Which Have Been Assigned To Them Under Existing State Law.***

Countless functions have been assigned to local governments under state law in areas such as land use planning, franchising, licensing, and the provision of public services. Local governments have been performing functions in these and other areas for decades and, in some cases, for centuries and even millenia. To allow for challenges to the validity of actions in these areas under the anti-

trust laws would seriously impede local government from taking action to protect the public interest. Hundreds of lawsuits involving antitrust challenges to acts of governance by local governments, such as zoning and waste disposal, have been filed since *Lafayette*, effectively jeopardizing the ability of cities and counties to govern.

If these activities can be challenged under the antitrust laws, then local governments will effectively be precluded from fulfilling their functions under state law. Moreover, there will be endless delay resulting from costly litigation while federal courts, sitting with exclusive Sherman Act jurisdiction, undertake an examination of state laws to infer or divine a legislative intent which could not possibly have existed at the time the legislation was adopted by the state.

2. ***State Governments Would Be Required To Assume Numerous Functions Which Are Presently the Responsibility Of Local Governments.***

Under the test proposed by the Petitioners, state government would be required to assume authority or substantially intervene in areas which it has delegated to local government. In effect, the Petitioners are suggesting that the activities of local government should be subject to the strictures of the antitrust laws unless based on specific directives established by a state regulatory agency such as the Public Service Commission of Wisconsin. *Brief for Petitioners* at 31, n.17. The difficulty with creating state regulatory bodies to perform such oversight functions, in addition to the creation of another layer of bureaucracy between the citizens and their government, is that state regulatory bodies may be entitled to no more deference under the antitrust laws than are local governments.

"[I]n cases involving the anticompetitive activity of a sovereign *representative* [as distinct from the sovereign itself], the Court has required a showing that the conduct is pursuant to a 'clearly articulated and affirmatively expressed policy' to replace competition with regulation."

Hoover v. *Ronwin*, —— U.S. ——, 104 S.Ct. 1989, 1995 (1984) (emphasis added). Thus, as a result of *Hoover*, only the actions of the sovereign itself are clearly immune from antitrust scrutiny. In fact, the Court indicated in *Hoover* that the exemption established for the actions of the sovereign (e.g., actions of the court) will have little practical significance because the practice of law may be the only "trade or profession in which the licensing of its members is determined directly by the sovereign itself [the state supreme court] . . ." 104 S.Ct. at 2002, n.34. Thus, the actions of a state regulatory body, because they apparently are not likely to be classified as actions of the sovereign itself, may be entitled to no more deference than those of a local government.

The State of Wisconsin has, through its legislature, determined that the provision of sewage service should be a responsibility of local government. The assumption by a state of a particular function does not mean that it will be more or less anticompetitive than local government. A shift in responsibility from the local to the state level will not necessarily enhance competition; it will simply force the state to assume regulatory responsibilities which it has already determined are more appropriately handled at the local level.

The complete restructuring of the relationship between state and local government proposed by the Petitioners will not further competition, which is the purpose of the Sherman Act. In any case, there is no evidence that state bureaucracies are any less likely to pursue their own "parochial" interests, motives which this Court attributed to local government in *Lafayette*, 435 U.S. at 408, in establishing anticompetitive policies than a local government would be. *Hoover* v. *Ronwin*, *supra*. Moreover, the anomolous result of accepting the strict test for state authorizing legislation advocated by the Petitioners would be a lack of uniformity in the antitrust laws: local governments could be exempt from antitrust challenge in one state which has enacted legislation conforming to whatever standards for state action exemption the Court articulates in this case, while local governments could be subject to the antitrust laws in another state for indentical conduct simply because of the absence of conforming state legislation.

B. The Petitioners' Interpretations Of *Lafayette And Boulder* Would Make The Allocation Of Governmental Responsibility Between State And Local Government A Matter Of Federal Law.

If the Petitioners' arguments are accepted, then a fundamental realignment of the intergovernmental system will be required. Specifically, any function which is currently delegated to local government under state law must either be assumed by the state through direct supervision or reauthorized and redelegated with specific directions conforming to this Court's decisions regarding the extent to which competition can be displaced by the actions of local government.

In effect, the federal antitrust laws could be used to require that the existing variegated system of state and local relations be replaced by a federally imposed uniform system for state delegation of authority to local governments. Under the test proposed by the Petitioners, every state in the nation would be required to adhere to a single system of delegating authority to local governments regardless of its own interest in structuring its governmental system in accordance with the state's particular needs. The Court's holding in the *Parker* case ("In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 351) would be effectively overturned if the Petitioners' proposed test were adopted.

Under the Petitioners' proposed test, the power of the state to establish a governmental system in accordance

with its own needs, including a system under which certain functions are delegated to local government, would be eliminated. If Congress has the power under the federal antitrust laws to dictate how the states should delegate governmental authority to local governments, then the sovereignty of the states has no real meaning.

1. *The Federal Courts Would Be Required To Determine The Validity Of State Delegations Of Authority To Local Governments On The Basis Of The Federal Antitrust Laws.*

Under the Petitioners' analysis of *Parker*, *Lafayette*, and *Boulder*, the federal courts would be required to determine the validity of state laws which delegate authority to local governments. Under the proposed test, federal courts would not consider whether the conduct of the local government was valid under state law, but rather whether the state law conformed to some federal standard articulated by this Court for the proper delegation of authority under the federal antitrust laws. Thus, the actions of local government, even though permissible under state law, would effectively be prohibited under federal law and local governments would be unfairly penalized for state inaction.

In fact, the approach suggested by the Petitioners would establish a framework for assessing local conduct which makes no sense and will impose an extraordinary burden on the federal courts, potentially necessitating the review of virtually all state laws which delegate responsibilities to local government. The first question would be whether the actions of the local government are based on a state law which meets the strict standards for the state action exemption proposed by Petitioners. In the unlikely event that these standards are met, the antitrust action would be dismissed. If the state law fails to meet these standards, then the courts would then have to assess the conduct of the local government under the antitrust laws, either applying the existing body of law which precludes consideration of benefits to the public (*see National Society of Professional Engineers* v. *United States*, *supra*) making the validity of any governmental action which adversely affects competition questionable, or developing and applying a new and separate body of law for the assessment of actions by local governments.

2. *In The Context Of The Unworkable Tests Which Have Been Established For Local Governments Urder The Antitrust Laws, The Seventh Circuit Has Made A Reasonable Effort To Accommodate The Interests Of State And Local Government.*

This Court has recently addressed the proper allocation of judicial authority between the federal and state courts for review of the actions of state and local officials. *See Parratt* v. *Taylor*, 451 U.S. 515 (1931); *Patsy* v. *Board of Regents of the State of Florida*, 457 U.S. 496 (1982); *Pennhurst State School and Hospital* v. *Halderman*, —— U.S. ——, 104 S.Ct. 900 (1984); *Davis* v. *Sherer*, —— U.S. ——, 104 S.Ct. 3012 (1984). These cases, which recognize that a remedy must be available in some forum, including the federal forum for matters involving an overriding federal interest, for wrongdoings by state and local officials, generally reflect the common theme of respect for federalism and deference to state courts on matters of state law.

In this case, the Seventh Circuit has attempted to advance these policies by devising a test, which is workable under Wisconsin law, for the extension of the state action exemption to local government that will allow for early dismissal of antitrust actions. It is particularly important in Sherman Act cases that the rule under which motions to dismiss can be readily argued is sufficiently clear and workable in light of the exclusive jurisdiction provisions of the Sherman Act. 15 U.S.C. sec. 4. When it appears that there is no significant federal interest, or where there is sufficient authority for the action under state law, disputes such as the one in this case should be returned to the state forum for resolution.

In most cases, there will be adequate remedies available under state law. A fundamental difference between public and private antitrust defendants is that public defendants are subject to an array of legal requirements which ensure accountability. Most states have open meeting laws, such as sunshine laws and freedom of information laws which apply to local governments. Local governments generally must comply with strict bidding and procurement requirements established under state law. Most importantly, public officials, are ultimately accountable to the public through the electoral process.

There are a variety of federal laws in addition to the federal antitrust laws which provide significant protection against unfair actions by local government. Local governments are no strangers to litigation under the Civil Rights Act of 1871. 42 U.S.C. sec. 1983. In fact, many of the antitrust cases which have been brought against local governments include section 1983 claims, resulting in even more convoluted litigation. *See Golden State Transit Corp.* v. *City of Los Angeles*, 520 F. Supp. 191, *reversed*, 686 F.2d 758 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 729 (1983), *on remand*, 563 F. Supp. 169, *affirmed*, 726 F.2d 1430 (9th Cir. 1984); *LaSalle National Bank* v. *County of Lake*, 579 F. Supp. 8 (D.C. N.D. Ill. 1984).

In addition to the civil rights laws, other federal protections have been established which protect against transgressions by state and local officials. For example, the provisions of the Robinson-Patman Act, 15 U.S.C. secs. 13(a) and (f), have been applied to commercially motivated retail transactions by state and local government. *Jefferson County Pharmaceutical Ass'n* v. *Abbott Laboratories*, —— U.S. ——, 103 S.Ct. 1011 (1983). Federal funds can be recovered from local government grantees when federal funds have been misspent. *Bell* v. *New Jersey*, —— U.S. ——, 103 S.Ct. 2187 (1983). The provisions of the federal bribery statute, 18 U.S.C. sec. 201, can be applied to local officials and their grantees.

Dixson v. *United States*, —— U.S. ——, 104 S.Ct. 1172 (1984).

The availability of numerous state and federal remedies, in combination with the fact that local officials are ultimately accountable through the ballot box to the public, argue for the establishment of a simplified rule for dismissal of antitrust actions such as that used by the Seventh Circuit.

C. Congress Does Not Have The Power Under The Commerce Clause To Abrogate The Sovereign Powers Of The States Under The Tenth Amendment.

1. *The Allocation Of Governmental Authority To Its Instrumentalities By The State Is An Integral Function Of The States And Is Not A Function Which Congress Can Take Away From The States Under The Commerce Clause.*

Under current law, states have broad latitude to create political subdivisions and to allocate governmental power to those subdivisions. *Holt Civic Club* v. *City of Tuscaloosa*, 439 U.S. 60, 71 (1978); *Sailors* v. *Board of Education*, 387 U.S. 105, 108 (1967). This flexibility is essential in order to allow for experimentation in the allocation of governmental power within states. As this Court said in *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980), any other result

> would interfere significantly with a State's ability to structure relations exclusively with its own citizens. It would also threaten the future fashioning of effective and creative programs for solving local problems and distributing government largesse. A healthy regard for federalism and good government renders us reluctant to risk these results. 447 U.S. at 441.

The sovereignty which federalism guarantees state and local government would be subverted if the rigid constraints which Petitioners would impose on local governments in the name of *Parker*, *Lafayette*, and *Boulder* are not rejected. The Court's decision in *National League*

of Cities v. *Usery*, 426 U.S. 833 (1976) is of special significance in this context. In *Usery*, this Court held that Congress lacked the power to control the employment conditions of state and local governments through the Fair Labor Standards Act, noting that the Tenth Amendment prevents Congress from "exercising power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." 426 U.S. at 845.

The Court in *Usery* was concerned that, regardless of whether the federal requirements were socially desirable, they might have the effect of "substantially restructur-[ing the] traditional ways in which local governments have arranged their affairs." 426 U.S. at 849. For that reason, the Court concluded:

> This exercise of congressional authority does not compare with the federal system of government embodied in the Constitution. We hold that insofar as the challenged amendments operate to directly displace the State's freedom to structure integral operations of traditional governmental functions, they are not within the authority granted Congress by [the Commerce Clause]. 426 U.S. at 852.

The Court thus recognized that principles of federalism as well as the Tenth Amendment militate against imposition by Congress on state or local government of "its choice as to how essential decisions regarding the conduct of integral governmental functions are made." 426 U.S. at 855. Moreover, the opinion clearly states that there are limitations on Congress's powers under the Commerce Clause to intervene in local as well as state matters:

> The local governmental units which Congress sought to bring within the Act derive their authority and power from their respective States. Interference with integral governmental services provided by such subordinate arms of a state government is therefore beyond the reach of congressional power under the Commerce Clause just as if the services were provided by the State itself. 426 U.S. at 855, n.20.

The principles enunciated in *Usery* should apply with even greater force in this case. *Usery* involved federal regulation of public employee relations, a more limited federal involvement in the integral operations of state and local government than is contemplated in this case. In this case, the ruling requested by the Petitioners will mean, at a minimum, direct federal involvement in state and local relations, including the establishment of federal guidelines for the delegation of governmental authority to local governments.

III. RECENT EFFORTS BY CONGRESS TO ENACT LEGISLATION TO PROTECT LOCAL GOVERNMENT AND THEIR OFFICIALS FROM LIABILITY UNDER THE ANTITRUST LAWS REFLECT WIDESPREAD DISSATISFACTION WITH THE UNWORKABLE STANDARDS WHICH HAVE BEEN APPLIED TO STATE AND LOCAL GOVERNMENT UNDER THE ANTITRUST LAWS.

A. The Vague And Conflicting Standards Enunciated By The Courts Have Confounded Congress.

Recent efforts by Congress to enact legislation protecting local governments and their officials from antitrust liability reflect the widespread dissatisfaction with the standards which have been established by the Court regarding the state action exemption under the antitrust laws. In fact, when confronted with the confusing standards established by the Court, both bodies of Congress are moving rapidly towards elimination of the damages remedy in all antitrust lawsuits against local governments or local officials, an extraordinary action for Congress. These actions have generally been characterized as the necessary first step in providing relief for local government[4] while Congress attempts to make sense out of the legal morass created by the Court's decisions.

The United States House of Representatives recently approved legislation which would exempt cities and city

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[4] S. REP. No. 593, 98th Cong., 2d Sess. 3 (1984).

officials from monetary damages under the antitrust laws.[5]

The full Senate is expected to take up a bill which is similar to H.R. 6027 (S. 1578) in the near future. S. 1578, which has been reported by the Senate Judiciary Committee and is sponsored by Senator Strom Thurmond of South Carolina, Chairman of the Senate Judiciary Committee, would exempt local governments and their officials from damages under the antitrust laws and would provide a limited exemption from damages for the conduct of persons acting on the basis of local government regulation.

After analyzing the shortcomings of the various bills considered by the House Judiciary Committee which would have changed the substantive standards governing the application of the antitrust laws to local governments, the House committee report accompanying H.R. 6027 concluded that "the most balanced legislative response at this time would be to restrict private remedies to injunctive relief" because "such an approach avoids the conceptual difficulties of the state action doctrine in determining whether a damage remedy is available." H.R. REP. NO. 965, 98th Cong., 2d Sess. 18 (1984). The committee report expressed dissatisfaction with the uncertainty created in the law as a result of the Court's various pronouncements on the state action doctrine, stating:

> The Supreme Court has been criticized—and perhaps rightly so—for not applying a consistent theory in the 'state action' cases . . . The two critical decisions involving municipalities (*Lafayette* and *Boulder*) contain eight separate opinions by various combinations of Justices. The Court is open to criticism . . . for its failure to provide an analytical framework by which future state action cases can be predicted with reasonable certainty. The only certainty in the law (as a result of the *Boulder* decision) may be that a home-rule amendment to a state constitution is not sufficient in itself to immunize a municipality's actions in a wide variety of contexts. H.R. REP. NO. 965, 98th Cong., 2d Sess. 7 (1984) (footnotes omitted).

[5] H.R. 6027, sponsored by Reps. Peter Rodino, Jr. of New Jersey, Hamilton Fish, Jr. of New York, Henry Hyde of Illinois, and Don Edwards of California, was approved by the House of Representatives on August 8, 1984 by a 414 to 5 vote. It would exempt cities and city officials from damages under the antitrust laws. The exemption would apply to "official conduct," defined as any "action or inaction" by a local government or an official, employee or agent of local government which "could reasonably have construed to be within the legislative, regulatory, executive, administrative, or judicial authority" of a local government. Sec. 2.

Furthermore, the committee noted, "[t]he underlying dilemma that may account in part for the Court's halting efforts to clear a path in this area is the inherent tension in accommodating the national policy favoring competition with the *presumptively valid functions of local government.*" *Id.* at 7 (emphasis added). The committee report analyzed the various legislative approaches which had been considered by the committee in the 98th Congress and explained the deficiencies of each.

The first approach would have established a "legislative immunity for municipalities co-extensive with that of the States provided that the local conduct is 'valid under State law' or that 'authority is vested' by the State"[6] in the local government. Underscoring the uncertainty as to the present meaning of the state action exemption established in *Parker*, this approach was dismissed in the committee report as not adequate to solve the problems confronting local governments under the antitrust laws: "The difficulty with this proviso . . . is that it would have the unintended effect of leading legal analysis back to the *Boulder*-type test for the delegation of state antitrust immunity. It is precisely this test which has spawned the antitrust dilemma now faced by governments." H.R.

[6] *Id.* at 13 *See generally* H.R. 2981, sponsored by Rep. Henry Hyde of Illinois; H.R. 3361, sponsored by Rep. Hamilton Fish, Jr. of New York; and H.R. 5573, sponsored by Rep. Bob Stump of Arizona.

REP. No. 965, 98th Cong., 2d Sess. 14 (1984) The committee report emphasized the inadequacies of the substantive standards applied under the state action exemption, including the standards which apply to state government, which have been established by the Court in *Boulder* and other cases.

> As to the core concept of these bills—that of providing local governments with the same immunity currently enjoyed by the States—such an approach may not sufficiently address the concerns of local governments. Local governments understandably object to the uncertainty and potential liability posed by *Boulder*, and some of these bills have proposed to put municipalities back in a pre-*Boulder* position by attempting to provide them with the same immunity currently enjoyed by the States. However, . . . *antitrust jurisprudence as it applies to States and State agencies remains case-specific, highly uncertain and, in some areas, undefined.* Municipalities which fear a continuing increase in antitrust litigation should take note of the number of state action cases filed against State or State agencies since the 'active supervision' prong of the state action test was announced in *Midcal* [*California Retail Liquor Dealers Ass'n* v. *Midcal-Aluminum, Inc.*, 445 U.S. 97 (1980)]." H.R. REP. No. 965, 98th Cong., 2d Sess. 14 (1984) (footnote omitted; emphasis added).

A second approach discussed in the committee report was the establishment of an immunity based on the nature of the local government's activity (e.g., whether an action is sovereign or commercial in character). *See* H.R. 3688, sponsored by Rep. Don Edwards of California. This approach was dismissed as unworkable with the statement that "witnesses pointed to the interpretive difficulties that some courts have had in applying similar tests based upon the distinction between governmental and proprietary activities." H.R. REP. No. 965, 98th Cong., 2d Sess. 15 (1984) (footnote omitted).

A third approach considered by the committee would have involved the establishment of a "municipal rule of

reason" under which "a balancing of governmental and competitive factors . . . would occur at the outset of litigation."[7] In discussing this approach, the report stated:

> The difficulty with this test is that it is unclear as to what kind of evidentiary showing would be required by the courts in sustaining a local government's action as being reasonably undertaken. Whether such a showing could be made on the initial pleadings without extensive discovery is also uncertain. Moreover, to the extent that subject matter jurisdiction should, as a general proposition, be established by a court as expeditiously as possible, this may not always be possible in complex cases. H.R. REP. No. 965, 98th Cong., 2d Sess. 17 (1984).

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[7] *Id.* at 17. *See also* H.R. 5992, sponsored by Rep. Peter Rodino of New Jersey.

CONCLUSION

The *amici* urge that the Court reject the rigid and unworkable tests proposed by the Petitioners for extension of the state action exemption to the actions of local government in this case. Because the test proposed by the Petitioners and the existing standards formulated by the Court in *Lafayette* and *Boulder* threaten the effective operation of state and local government and improperly inject the Federal Government into the relationship between state and local government, the Court should establish a standard which recognizes that acts of governance by local government, when the local government is not engaged in commerce or trade, are not cognizable under the antitrust laws.

For the foregoing reasons, *amici* request that the judgment of the Seventh Circuit be affirmed and clear standards be established under which acts of governance by a local government are not cognizable under the Sherman Act.

Respectfully submitted,

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